Supreme Court, U.S.
FILED

No. _____

031232 FEB 25 2004

OFFICE OF THE CLERK

In The Supreme Court of the United States

JUAN JOSE VALLADARES-HELGUERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lyle J. Yurko
Counsel of Record
YURKO & OWENS, P.A.
402 West Trade Street
Suite 101
Charlotte, North Carolina 28202
(704) 347-0407

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

The Court of Appeals overlooked a material fact and gave significant weight to wiretap testimony that did not meet the Governments burden of proof. The Court of Appeals ruled as to the admissibility of this evidence and not on whether the tapes satisfied the Governments burden. The Defendant does not challenge the admissibility of the tapes, but challenges whether the tapes meet the preponderance of the evidence standard.

Lyle J. Yurko, attorney on behalf of Juan Valladares, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

LIST OF PARTIES TO PROCEEDING

The parties in the proceeding below are those listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

REASONS FOR ALLOWANCE OF WRIT 5

THE DISTRICT COURT ERRED IN FINDING THAT THE CRACK PORTION OF THE CONSPIRACY WAS REASONABLY FORESEEABLE TO VALLADARES WHEN SUCH A FINDING WAS CONTRARY TO THE EVIDENCE PRESENTED 5

TABLE OF AUTHORITIES

Page

CASES

United States v. Lewis,
235 F.3d 215 (4th Cir. 2000) 6

United States v. Urrego-Linares,
879 F.2d 1234 (4th Cir. 1989), *cert. denied*,
122 S. Ct. 39 (2001) 6

United States v. White,
875 F.2d 427 (4th Cir. 1989) 6

STATUTE

28 U.S.C. § 1254 1

OPINIONS BELOW

The District Court entered judgment on January 13, 2003. The Court of Appeals affirmed the judgment of the District Court on October 16th, 2003 in an unpublished opinion. (App. 1a) A petition for rehearing was denied on November 25, 2003. (App. 8a)

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court on October 16th, 2003 in an unpublished opinion. A petition for rehearing was denied on November 25, 2003. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

This case is before the Court from an indictment from the Western District Grand Jury July 10, 2000, charging Appellant with conspiracy to possess with intent to distribute and distribute cocaine, cocaine base, and marijuana and money laundering. (App. 31a)

The Defendant pled guilty on March 8, 2001 to one count of conspiracy to possess with intent to distribute and distribute cocaine, cocaine base, and marijuana and one count of money laundering.

On December 19, 2002, Valladares appeared before the Honorable Richard L. Voorhees at the above case for sentencing. The court imposed a sentence of Life at Count one and a sentence of twenty (20) years at

Count two to run concurrent with his sentence at count one.

A Notice of Appeal was filed on December 30, 2002.

Prior to sentencing, the Defendant objected to findings in the pre-sentence investigation report concerning his role of leadership in the conspiracy and an adjustment of the offense level for possessing a firearm in the course of the conspiracy. On the day the defendant appeared for sentencing, he contested the computation of his base offense level maintaining that the cocaine base was not reasonably foreseeable to him is part of the conspiracy. (App. 11a)

To support the government's position that the defendant was a leader of the alleged conspiracy, that at least 1.5 kilograms of crack cocaine was reasonable foreseeable as part of the conspiracy, and that the defendant possessed a firearm during the course of the conspiracy the government called U.S. Customs agent, Roger Jernigan. (App. 13a).

Valladares testified at the hearing to refute the testimony of the government. (App. 22a).

After hearing all the evidence and the arguments of counsel, the District Court determined that Valladares was not entitled to an adjustment for acceptance of responsibility. (App. 28a). The Court further held that Valladares objection concerning the crack cocaine was overruled. (App. 28a). The Court also found that Valladares was a leader and organizer. (App. 28a). The

Court did not specifically rule on Valladares' objection to the weapon enhancement. (App. 28a).

The Court found Valladares to have a criminal history category of one (I). (App. 29a). The Court imposed a sentence of life imprisonment on Count one and a sentence of twenty years on Count two running concurrently. (App. 30a).

On December 30, 2002, Valladares, through counsel, filed a timely Notice of Appeal. (JA 88). This case is now in the Fourth Circuit Court of Appeals pursuant to this Notice.

STATEMENT OF FACTS

To support findings of the pre-sentence investigation report of challenged by Valladares, the government called one witness at Valladares' sentencing hearing, Roger Jernigan. U.S. Customs Agent Jernigan testified that he began investigating the Appellant following the arrest of an individual named Jimmy Philbeck. Mr. Philbeck stated that one of his marijuana and cocaine sources was Jose Valladares and described Valladares as his "boss". (App. 14a).

Jernigan also testified that during the course of the investigation, telephone conversations were wiretapped between the Defendant and an individual named Juan Mercado. (JA 60). During a three day period, the two talked numerous times and Mercado was complaining about the quality of the cocaine. (App. 15a). Jernigan did not testify as to the exact words or nature of the complaints of the quality nor did he specify

whether the conversation was in Spanish or English. However, when Mercado was later debriefed, he stated that he believed Valladares knew that the cocaine was being cooked into crack because he was concerned about providing the highest quality of cocaine powder. (App. 16a).

When questioned about the amount of crack that was foreseeable to Valladares, Jernigan states, " according to Mr. Philbeck... there is no evidence about that, just powder cocaine". (App. 16a). As to cocaine sold to Mercado, Jernigan states that Valladares sold him 20 to 30 kilos of powder and estimates "a large amount was cooked into crack". (App. 17a). Jernigan then names two more customers of Valladares but does not mention any amounts discussed with respect to cooking cocaine into crack. (App. 17-18a). In response to the government's question of the amount of cocaine base that was foreseeable to Valladares, Jernigan offered "a conservative estimate, maybe 20 to 25 kilograms." (App. 18a).

Jernigan was asked about members of the conspiracy that carried firearms. Jernigan stated that some members did carry firearms. (App. 20a). When questioned as to whether those firearms were known to Valladares, Jernigan stated, "I know he was arrested at one point in time during the conspiracy with a firearm and marijuana." (App. 20a). When questioned as to whether they were in a vehicle, Jernigan stated, "To be honest, I don't recall at the time." (App. 20a). The government asked if Jernigan could relate the marijuana and the gun and again he responded, "I believe it was in

a vehicle but I do not- I do not recall at this time." (App. 20a).

Mr. Valladares testified at his sentencing hearing. (App. 22a). Prior to his testimony, the Court confirmed that he has discussed various sentencing issues with his attorney with the assistance of an interpreter. (App. 22a).

Mr. Valladares pled guilty and accepted responsibility for being involved in a conspiracy to possess with intent to distribute and distributing cocaine and marijuana. (App. 23a). Mr. Valladares denied selling crack or having any knowledge that the cocaine he sold would be cooked into crack. (App. 23a). Valladares testified that when his customers complained about the quality, he understood it to mean that the cocaine was "not good for the nose". (App. 26a). Again, it was not made clear to the court whether these conversations between the Defendant and his customers were spoken in Spanish or English.

REASONS FOR ALLOWANCE OF WRIT

THE DISTRICT COURT ERRED IN FINDING THAT THE CRACK PORTION OF THE CONSPIRACY WAS REASONABLY FORESEEABLE TO VALLADARES WHEN SUCH A FINDING WAS CONTRARY TO THE EVIDENCE PRESENTED.

Standard of review:

The Court of Appeals is bound by the district court's factual finding unless such determinations are clearly erroneous. United States v. White, 875 F.2d 427, 431 (4th Cir. 1989) This court has consistently held that "facts relevant to a sentencing determination need only be proved by a preponderance of the evidence." United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000) (citing United States v. Urrego-Linares, 879 F.2d 1234, 1237-38 (4th Cir. 1989)), *cert. denied*, 122 S. Ct. 39 (2001). The Court of Appeals for the Fourth Circuit has misapplied a critical fact which has resulted in a life sentence for the defendant.

The Appellant contends that trial courts finding that the crack portion of the conspiracy was reasonably foreseeable to the Appellant was clearly erroneous. The evidence offered does not meet a preponderance of the evidence standard.

In the instant case, Valladares admitted selling powder cocaine but the Government argued that it should have been reasonably foreseeable to the defendant that the powder was being turned into crack by his customers. This determination resulted in denial of acceptance of responsibility and therefore a mandatory life sentence.

Mr. Valladares is a Mexican National. He stated that he cannot speak or understand English. He needed an interpreter in order to testify at sentencing. (App. 22a) In this testimony Valladares said that he had no knowledge of the cocaine being cooked into crack. (App.

23a) The District Court judge stated that this testimony by Valladares was "incredible." (App. 28a) However, the only evidence offered against him regarding this issue was the testimony of Agent Roger Jernigan regarding taped conversations. No representations were made as to whether the taped conversations were in English or Spanish. No representations were made as to whether Valladares understood the conversations at all. No evidence was offered as to how Agent Jernigan understood the tapes or who translated those tapes if needed.

In the Court of Appeals ruling, it was stated that, "Valladares does not suggest nor provide any evidence that the conversations were not clearly understood." During cross-examination Valladares stated that he only knew of complaints that the cocaine was "not good for the nose".

It is unreasonable and clearly erroneous that the District Court could find by a preponderance of the evidence that it was reasonably foreseeable that Valladares knew the cocaine was being cooked into crack when under oath he testified that he had no such knowledge and the only evidence offered against him was testimony about tapes that made no mention of the language of those recordings and no representation that the defendant understood them. The assigned panel of the Court of Appeals having misapplied this critical fact and having ruled on admissibility and not the proper weight to be given this critical evidence now requires that a writ of certiorari be granted especially in light of the fact that this mis-decision results in a life term for the Defendant.

Juan Jose Valladares respectfully requests the Supreme Court of the United States to grant this petition for writ of certiorari.

Respectfully submitted this 25th day of February, 2004

/s/ Lyle J. Yurko
Lyle J. Yurko

Yurko & Owens P.A.,
402 West Trade Street
Charlotte, NC 28202
704-347-0407

No. (2)

Supreme Court, U.S.
F
03123 2 FEB 25 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JUAN JOSE VALLADARES-HELGUERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Lyle J. Yurko
Counsel of Record
YURKO & OWENS, P.A.
402 West Trade Street
Suite 101
Charlotte, North Carolina 28202
(704) 347-0407

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS
Appendix to Petition

Page

Unpublished Opinion of
United States Court of Appeals
for the Fourth Circuit
entered October 16, 2003 ..... 1a

Order of
United States Court of Appeals
for the Fourth Circuit
Re: Denying Petition for Rehearing
entered November 25, 2003 ..... 8a

Excerpt of Transcript of Sentencing Before
The Honorable Richard L. Voorhees, Esq.
United States District Court for the
Western District of North Carolina at Charlotte
on December 19, 2002 ..... 9a

Bill of Indictment of
United States District Court for the
Western District of North Carolina at Charlotte
filed August 7, 2000 ..... 31a

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 03-4095

JUAN JOSE VALLADARES-HELGUERA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Richard L. Voorhees, District Judge.
(CR-00-130)

Submitted: October 3, 2003
Decided: October 16, 2003
[Entered: October 16, 2003]

Before WILLIAMS and SHEDD, Circuit Judges,
and HAMILTON, Senior Circuit Judge.
Affirmed by unpublished per curiam opinion.

COUNSEL

Lyle J. Yurko, YURKO & OWENS, P.A., Charlotte, North Carolina, for Appellant. Robert J. Conrad, Jr., United States Attorney, Jennifer Marie Hoefling, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Jose Juan Valladares-Helguera (Valladares) pled guilty, without a written plea agreement, to one count of conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana, 21 U.S.C. § 846 (2000), and one count of conspiracy to commit money laundering, 18 U.S.C. § 1956(h) (2000). He was sentenced to life imprisonment. Valladares appeals, claiming that: (1) the district court erred in applying a two-level enhancement for possession of a firearm; (2) the district court erred in applying a four-level enhancement for being a leader or organizer of the drug conspiracy; (3) the district court erred in finding that the crack cocaine portion of the conspiracy was reasonably foreseeable to him; (4) the district court erred in denying a threelevel reduction for acceptance of responsibility; and, (5) his life sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Finding no reversible error, we affirm. In 1999, a state police investigation uncovered a large cocaine and marijuana trafficking organization in the Western District of North Carolina. One of the co-conspirators arrested, Jimmy Philbeck, identified Valladares and his brother Carlos as the primary suppliers of the conspiracy; according to Philbeck, the brothers supplied him with 2000 pounds of marijuana and 8 kilograms of cocaine over an eightmonth period. At Valladares' sentencing hearing, United States Customs Agent Roger Jernigan testified that Philbeck identified Valladares as "the boss" of the organization in that he "controlled and told the others what to do."

Jernigan also testified that information received from wiretaps on Valladares' phone indicated that Valladares knew that the cocaine he supplied was being cooked into crack cocaine. Specifically, Valladares had several conversations over a three-day period pertaining to the quality of the cocaine as determined by its quality when cooked into crack. Jernigan also stated that according to another coconspirator, Valladares was aware that a large part of the cocaine that he supplied was being cooked into crack. Co-conspirator Juan Mercado stated that he received approximately twenty to thirty kilograms of cocaine powder from Valladares and that a large amount of that cocaine was cooked into crack.

The presentence report recommended a two-level enhancement for possession of a dangerous weapon (a firearm) based on a 1997 state court conviction for possession with intent to sell and deliver marijuana and carrying a concealed gun. USSG § 2D1.1(b)(1). Based on a total offense level of 44 and a criminal history category I, the district court sentenced Valladares to the recommended guideline sentence of life imprisonment. He noted a timely appeal. Valladares first challenges the enhancement he received for possession of a dangerous weapon. A two-level enhancement must be given under USSG § 2D1.1(b)(1) if a dangerous weapon was possessed during the offense. Application Note 3 provides that the enhancement applies if the weapon is present, unless it is clearly improbable that the weapon was connected with the offense. The determination that a weapon enhancement is warranted is a factual

determination subject to clearly erroneous review. *United States v. Apple*, 915 F.2d 899, 914 (4th Cir. 1990).

Valladares' 1997 conviction for carrying a concealed weapon occurred during the time period charged in the indictment. Valladares did not refute this evidence. Moreover, Agent Jernigan testified that other members of the conspiracy carried firearms and that those firearms were foreseeable to Valladares. Thus, the district court's finding of this enhancement was not clearly erroneous.

Next, Valladares argues that the district court erred in applying a four-level enhancement for his role in the offense. A district court's determination of the defendant's role in the offense is a factual finding that is reviewed for clear error. *United States v. Perkins*, 108 F.3d 512, 518 (4th Cir. 1997). Section 3B1.1(b) provides for a four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The commentary clarifies the applicability of the enhancement: "to qualify for an adjustment under this section, the defendant must have been an organizer, leader, manager, or supervisor of one or more other participants." USSG § 3B1.1, comment. (n.2). The enhancement only requires the recruitment of one other person. *United States v. Kincaid*, 964 F.2d 325, 329 (4th Cir. 1992). Factors distinguishing a leadership or organizational role from lesser roles include exercise of decision-making authority, the nature of the participation in the offense, recruitment of accomplices, the claimed right to a larger share of the proceeds, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and

the degree of control and authority exercised. USSG § 3B1.1, comment. (n.4).

The indictment named twenty-five members of the conspiracy. In addition to information contained in Valladares' presentence report, the evidence of Valladares' leadership was provided by Jernigan's testimony at the sentencing hearing. There, Jernigan testified that Philbeck identified Valladares as "the boss" of the organization because he "controlled and told the others what to do." Moreover, Valladares' own testimony established that he received large quantities of drugs from Mercado in Mexico and that he (Valladares) then distributed the drugs to Philbeck and others in North Carolina. Given this uncontradicted evidence, we find that the district court's application of the enhancement for Valladares' leadership role was not clearly erroneous.

Next, Valladares asserts that the district court erred in attributing the conspiracy's crack cocaine to him. Specifically, Valladares argues that the district court erred in relying on the wiretapped phone conversations as evidence because the government did not introduce any evidence about whether the wiretap conversations were in English or in Spanish. These objections were waived because Valladares failed to raise them at his sentencing hearing. Moreover, Valladares does not suggest, nor provide any evidence, that the conversations were not clearly understood. In addition, the district court specifically found Valladares' testimony on this subject "incredible." We thus find that the district court did not clearly err in attributing crack cocaine to Valladares. Fourth, Valladares challenges the district court's denial of a

threelevel reduction for acceptance of responsibility. USSG § 3E1.1(a),(b).

The district court's determination regarding acceptance of responsibility is factual and is reviewed with great deference for clear error. USSG § 3E1.1, comment. (n.5); *United States v. Ruhe*, 191 F.3d 376, 388 (4th Cir. 1999). The burden is on the defendant to establish by a preponderance of the evidence that he is entitled to the adjustment. *United States v. Urrego-Linares*, 879 F.2d 1234, 1238-39 (4th Cir. 1989).

Valladares' guilty plea did not automatically entitle him to a reduction for acceptance of responsibility. *United States v. Nale*, 101 F.3d 1000, 1005 (4th Cir. 1996). The district court denied the adjustment because Valladares refused to accept responsibility for distributing crack cocaine and because the court found his testimony "incredible." We find that the district court did not clearly err. *See United States v. Harris*, 882 F.2d 902, 905 (4th Cir. 1989) ("A defendant's credibility and demeanor play a crucial role in evaluating whether he is genuinely contrite and has accepted responsibility and the sentencing judge is in a unique position to evaluate these factors."); *see also* USSG § 3E1.1, comment. (n.1(a)) (finding defendant who falsely denies or frivolously contests relevant conduct determined to be true does not merit adjustment for acceptance of responsibility). Finally, Valladares argues that his life sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Valladares' sentence was based upon 3000 pounds of marijuana, 38 kilograms of cocaine, and over 1.5 kilograms of crack cocaine and was enhanced on the

grounds addressed above. His guideline range was life imprisonment.

We find that, given the length of the conspiracy, the amount of drugs involved, and Valladares' leadership role in the conspiracy, his life sentence was not unconstitutional. Furthermore, Valladares' sentence was based on an amount exceeding that involved in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence for a firsttime drug offender who possessed 672 grams of cocaine powder). This court has "found that a life sentence for a major drug violation is not disproportionate in comparison with other sentences under the Guidelines." *United States v. D'Anjou*, 16 F.3d 604, 613 (4th Cir. 1994). Accordingly, Valladares has failed to show an Eighth Amendment violation.

We affirm Valladares' sentence. We dispense with oral argument because the facts and legal contentions are adequately addressed in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4095
CR-00-130

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN JOSE VALLADARES-HELGUERA,

Defendant - Appellant.

Filed: November 25, 2003
[Entered: November 25, 2003]

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel comprised of Judge Williams, Judge Shedd, and Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:00CR130-3
DECEMBER 19, 2002

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
vs.	)
	)
JUAN JOSE VALLADARES-HELGUERA,	)
	)
Defendant.	)

_____/

TRANSCRIPT OF SENTENCING BEFORE
THE HONORABLE RICHARD L. VOORHEES, ESQ.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF
GRETCHEN C. F. SHAPPERT, ESQ.
U. S. Attorney's Office
227 W. Trade Street
Charlotte, NC 28202

FOR THE DEFENDANT
MARK P. FOSTER, ESQ.
1800 Camden Road
Suite 105
Charlotte, NC 28203

Proceedings reported and transcript produced by computer-aided transcription by:

JOY KELLY, RPR
U. S. Official Court Reporter
Charlotte, North Carolina
704-375-7505

(Interpreter Jackie Gonzales sworn as the interpreter to interpret English into Spanish and Spanish into English.)

THE COURT: Is your name Jose Juan Valladares-Helguera?

THE DEFENDANT: Yes

THE COURT: Would the government wish to amend the indictment to show that it's Jose Juan instead of Juan Jose Valladares-Helguera?

MS. SHAPPERT: Yes

THE COURT: Let the indictment be amended accordingly. Has the interpreter been sworn?

THE CLERK: Yes, sir.

THE COURT: All right. Thank you. The record will so reflect. Did you appear before Judge Horn on March 8th of this year and plead guilty in your case?

MR. FOSTER: I think it was the previous year, Your Honor.

MS. SHAPPERT: I think it was 2000.

THE COURT: 2000.

THE CLERK: 2001.

THE COURT: 2001.

THE DEFENDANT: Yes

THE COURT: Thank you. And did you enter your

****

Plea that included as a part of the charge distribution conspiracy to distribute cocaine base, especially in as much as cocaine base as a part of the charge increases the penalties substantially.

MR. FOSTER: Yes, I have, Your Honor. We've gone over this several times and he attests any personal responsibility for any amount of crack cocaine or any -- that any amounts were reasonably foreseeable to him despite his plea.

THE COURT: Well, does anyone present have a copy of the Rule 11 hearing?

MS. SHAPPERT: No.

MR. FOSTER: No, Your Honor.

THE COURT: Is it the recollection of counsel that the defendant pled guilty and answered the -- I see the clerk has got the documentation here.

MS. SHAPPERT: I believe neither counsel was at the plea and Rule 11.

THE COURT: Neither or you were there.

MR. FOSTER: I was not his attorney.

THE COURT: Okay. It was Joe Ledford. The defendant indicated that he understood the maximum and minimum penalties. He had received a copy of the indictment, discussed its contents with his attorney, understood the charges, and these were under oath. And he

*****

the government to entertain questions along those lines.

MS. SHAPPERT: Yes, sir. Thank you.

ROGER JERNIGAN

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SHAPPERT

Q Would you state your full name for the Court, please.

A Roger Neal Jernigan.

Q And by whom are you employed?

A United States Customs Service, Charlotte, North Carolina.

Q And in that capacity are you the case agent on the Defendant who is currently being sentenced?

A Yes, ma'am, I am.

Q Can you explain briefly for the Court how you became involved in this investigation?

A It was, I believe it was on August 4 of 1999, the Gaston County Police Department arrested Jimmy Philbeck in Gaston County with approximately 131 pounds of marijuana and about 20 ounces of cocaine.

Q And as a result of that arrest, was Mr. Philbeck debriefed?

A He was.

Q And what, if anything, did you learn that pertained to this defendant?

A He identified his sources of marijuana and cocaine as being the defendant, Jose Valladares', his brother, Carlos Valladares, the brother-in-law of Mr. Valladares, whose name as Jose Abundes, and there was one other defendant names Angel. I do not recall his full name at this time, but Angel, and he was a runner for Mr. Valladares.

Q With regard to the defendant, Valladares, did he indicate what Mr. Valladares' role was in the distribution of cocaine and marijuana?

A Correct. He was -- they described him -- Mr. Philbeck, along with several other defendants throughout the case, described Mr. Valladares as the boss. He is the one that controlled and told the others what to do.

Q And was this corroborated by other witnesses that you interviewed in the case?

A That's correct.

Q And did they indicate that he was the person who made the determination as to which customers received which quantities of cocaine and marijuana?

A That is correct.

Q And was he the one who was in charge of the roles of the different distributors in the conspiracy?

A Yes, ma'am, he was.

Q In addition to witnesses providing that information, was there also a Title III in this case?

A Yes, ma'am, there was.

Q Was Mr. Valladares on the wire?

A Yes, ma'am. It was his phone that we had the wire intercept on.

Q Have you had an opportunity to review the Title III taps in this case?

A Yes, ma'am. It's been a while, but yes, ma'am.

Q Have you reviewed conversations with Mr. Valladares?

A Yes, ma'am.

Q With regard to those conversations, were there conversations about cocaine being cooked into crack cocaine?

A Yes, ma'am, there was.

Q Was that during the course of the conspiracy alleged in the indictment?

A Yes, ma'am.

Q And did the conversations about cocaine being cooked into crack cocaine continue over a three-day period?

A It was somewhere around three days, four days they continuously talked. Apparently, Mr. Valladares had sold some cocaine to Juan Mercado, who in turn sold it to a customer of his. When they cooked it into crack, the cocaine was not as pure as what they had liked previously and it did not come back 100 percent. They were upset about that because they were losing some of their product. And there was a lot of conversation over a three-day period between Mr. Mercado and Mr. Valladares about the quality of the cocaine and the fact that when they were cooking it, it would not come back a hundred percent and they were having a problem. And he was wanting to know how to make up for the lost cocaine.

Q Based on those conversations, could you ascertain how much cocaine base or crack cocaine was being discussed in those conversations?

A That particular deal, I believe it was a half akilogram of cocaine that was sold.

Q Half of kilo cocaine powder that was subsequently cooked into crack cocaine?

A On that particular occasion, yes, ma'am.

Q And coming back is something less than a half of kilo of crack cocaine?

A Yes, ma'am.

Q In addition to those conversations did you have other information that Mr. Valladares was aware that cocaine powder was being cooked into crack cocaine?

A Yes, ma'am. Juan Mercado, was who eventually indicted in this case and cooperated and was debriefed, and he told us about 20 to 30 kilograms of powder cocaine that he purchased in the Charlotte area who has not been charged at this time. And that that cocaine was being cooked into

****

Juan Mercado stated that he received approximately 20 to 30 kilograms of powder cocaine from Mr. Valladares who -- it was sold to a another person in this area. And a large amount of that cocaine was cooked into crack.

And Mr. Valladares -- and this is also purchased cocaine from Fernando Hernandez, who is a defendant in this case, and he was one of the -- sort of like a three-way conversation, when I previously mentioned about the cocaine that was apparently of poor quality and was cooked up and there was a conversation about getting better cocaine and how they were going to make up for the loss, the conversations took place between Fernando Hernandez, who supplied the cocaine to Mr. Valladares, who in turn sold it to Juan Mercado. And those three individuals were talking about this cocaine that did not cook up as it should have over about a three-day period. There were multiple conversations about that.

And there's also another individual named Filadelpho Teenoco (ph). And he stated during the telephone intercept, he told Mr. Valladares he had received 30 kilograms of cocaine and that he had ten kilograms left and he wanted to know how many Mr. Valladares wanted.

Mr. Valladares told him that he wanted to purchase six of the kilograms of cocaine. And he picked those kilograms up with another individual named Antonio Millan the following day, and we established surveillance early the next morning. And we followed Mr. Valladares, Jose Abundes, Antonio Millan in two different vehicles transport three kilograms of this cocaine from Monroe, North Carolina, to a customer in eastern North Carolina.

Q Based on your investigation, Agent Jernigan, do you have an estimate as to the numbers of the kilos of cocaine powder that were reasonably foreseeable to Mr. Valladares?

A Between 40 and 50 kilograms of cocaine powder.

Q And based upon your investigation, how much of that powder was cooked into cocaine base that was foreseeable to Mr. Valladares?

A To give a conservative estimate, maybe 20 to 25 kilograms.

Q Now, was Mr. Valladares also responsible for the distribution of large quantities of marijuana in this conspiracy?

A Yes, ma'am, he was.

Q What is your information with regard to his involvement in marijuana distribution in this conspiracy?

A Mr. Valladares worked for an individual named Jose Corona, who was the main target of our investigation. And Mr. Corona was involved in the smuggling of large quantities of marijuana. We're talking about multi-ton quantities of marijuana from Mexico, across the U. S. border. And he owned a trucking company in eastern North Carolina. He utilized those trucks to transport the large shipments of marijuana to various locations throughout the United States, including the Western District of North Carolina.

Q And did Mr. Valladares distribute Mr. Corona's marijuana in the Western District of North Carolina?

A Yes, ma'am, he did.

Q Did Mr. Valladares have at least five or more persons who were distributing for him, Mr. Valladares, in the Western District of North Carolina?

A Yes, ma'am, he did.

Q Do you have an estimate as to the number of kilograms of marijuana there were foreseeable to Mr. Valladares during the course of this conspiracy?

A The best estimate that we could come up with from what witnesses told us was approximately 3,000 pounds, which would convert to somewhere around 1400 kilos I guess.

Q Now, with regard to this conspiracy, is there any information that members of the conspiracy were carrying firearms during and in relation to the distribution of these drugs?

A Some of the members did.

Q And were those firearms based on your investigation known to Mr. Valladares?

A I know he was arrested at one point in time during the conspiracy with a firearm and marijuana.

Q And when did that occur?

A That was August 17th, 1996.

Q And were they in a vehicle or at a residence?

A To be honest, I don't recall at the time.

Q Can you relate the connection between the marijuana and the gun according to your investigation?

A I believe it was in a vehicle but I do not -- do I not recall at this time.

Q In addition to the gun that was taken from Mr. Valladares during the course of the conspiracy, were other members of the conspiracy with whom he was working also carrying firearms?

A Yes, ma'am.

Q And were those firearms, based on your investigation, foreseeable to him?

A Yes, ma'am.

Q Based upon your training and experience, Agent Jernigan, do persons involved in large scale trafficking of cocaine and marijuana frequently carry firearms for protection in the drug trade?

A Yes, ma'am, they do.

Q Was that true in this conspiracy?

A Yes, ma'am.

Q Now, with regard to the money laundering count in this

****

THE COURT: Have you discussed it with your attorney in detail with the help of the interpreter?

THE DEFENDANT: Yes.

THE COURT: All right. Would you want to present any evidence concerning your objections, the government having already offered evidence along those lines?

MR. FOSTER: Yes, Your Honor. Yes, we call the defendant, Your Honor.

THE COURT: All right

MR. FOSTER: Just so the Court knows where we're going, this pertains to objections, the original objections by Mr. Ledford dated May 23, 2001, pertaining to objections as to the drug quantity and the leader, organizer enhancement.

THE COURT: All right.

JOSE JUAN VALLADARES-HELGUERA

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FOSTER

Q Mr. Valladares, you pled guilty in this case to a conspiracy to launder money, those proceeds of illegal drug benefit. Correct?

A Yes.

Q You have also pled guilty to conspiracy to possess with intent to distribute quantities of cocaîne, cocaine base and marijuana. Correct?

A Yes, marijuana and cocaine.

Q And you accept responsibility for having committed those two offenses?

A Yes.

Q As to crack cocaine, was any amount of crack cocaine reasonably foreseeable to you in your participation in this drug distribution conspiracy?

A What again?

Q Were you aware of any amount of crack cocaine being distributed as part of this conspiracy?

A No.

Q Did you ever personally sell any crack cocaine?

A Me?

Q Yes.

A No, I never sold crack.

Q Were you a leader -- let me back up. Did you have telephone conversations with anyone where you discussed powder cocaine being cooked into crack cocaine?

A I only had a conversation with them about the amount, how would I say this, the amount of cocaine. I didn't know what they were going to do with it. They told me that it wasn't acceptable. I didn't know it was to be cooked or what.

Q Were you a leader or organizer of other people who were distributing drugs?

A I worked for somebody in Mexico who would send me, he would give me about 1200 pounds of marijuana and I would give it to Jimmy Philbeck and Tommy Thomas, a client of Juan Mercado. That's his client.

Q What I'm asking -- did anyone work for you? Did you tell anyone what to do?

A First you said I said I sold 600, 700

(Interpreter has a conversation with defendant.)

A I worked for Juan Mercado at the end of it. He never delivered me anything. He would be at his shop. I would get him the marijuana and leave it with him.

Q Did you tell any other persons what to do or did anyone work for you in distributing marijuana or any other drug?

(Interpreter and defendant have a conversation.)

A No. I went to the Mexico. I left some with somebody but I left it for them to give to Jimmy Philbeck. But from that money for that marijuana I didn't earn anything. I never earned anything from that cocaine and the marijuana that I left.

Q Was the total amount of marijuana that was foreseeable to you about 2700 or 2800 pounds worth?

A That's what I sold.

Q And how about, was the total amount of powder cocaine that was reasonably foreseeable to you about five kilograms?

A Yes. Five kilos, because -- yes, because I went to Mexico and that's when they arrested Jimmy Philbeck.

Q Do you accept responsibility for your activities in distributing those amounts of cocaine powder and marijuana?

A Yes. Because I was supposed to drop off the cocaine but someone else did.

MR. FOSTER: I have no further questions.

CROSS EXAMINATION

BY MS. SHAPPERT

Q Are you telling this court that you worked for Mr. Mercado?

A I would get the marijuana and give it to him for him to get to his clients.

Q Well, you are aware, are you not, that on the conversations involving cooking up salsa, which was crack into crack cocaine, that you were selling to Mercado, not buying from Mercado. You are aware of those conversations, aren't you?

A No. Juan Mercado asked me for one and a half kilos of cocaine.

Q And you sold him one and a half kilos of cocaine in that transaction, didn't you?

A Yes.

Q Well, then why were you talking about cooking the salsa up and you were losing two or three ounces of salsa? What was that all about?

A They said it wasn't good for the nose.

Q The salsa wasn't good for the nose?

A Yes. The coke wasn't any good.

Q What were you talking about when they were referencing that it was not all coming back and that they were losing two to three ounces, what did you understand that to mean?

A They just told me it wasn't any good. I didn't know what it was for.

Q With powder you don't lose anything, though, do you, sir?

A What?

Q With powder you don't lose any.

A He just told me -- he just told me that they were losing. I didn't know what they were using it for.

Q Now, during the time of this conspiracy you had a cell phone, did you not?

A Who, me?

Q Yes. You.

A That I carried a cell phone?

Q That was what I asked you.

A Yes, I had a cell phone.

Q And, in fact, you had several cell phones?

A Two. Only two.

Q Only two.

*****

were objecting to the quantity.

So that being the case, under the acceptance of the responsibility rules, 3E1.1A and B, the defendant's acceptance is undermined. That is supported -- that finding is supported by the preponderance of the evidence, that presented by Mr. Jernigan, by the defendant in his incredible statements, and in the defense conduction section of the Presentence Report.

Defendant's objection to quantity is also overruled, the evidence being abundant and beyond the threshold of a preponderance, support the findings in the Presentence Report and supporting the calculations of the guidelines.

There were certain objections to facts stated in the Presentence Report. However, it appears that those are not contradicted by evidence, and the Court reaffirms the findings in the Presentence Report by the preponderance of the evidence concerning the offense conduct statement in the Presentence Report.

The Court finds that he was a leader and organizer, that his involvement involved direction and instructions to more than five or more individuals, and that he was the leader of the Monroe branch of this conspiracy.

Consequently, all of the objections are overruled, those posed by the defendant.

The defendant's total offense level then is 44. It comes back to 43 since there is not a level 44, putting the defendant in the guideline posture where the sentence is life.

Will there be any motion for a departure?

MS. SHAPPERT: Not on behalf of the United States.

MR. FOSTER: No, Your Honor.

THE COURT: You may be heard on the matter of sentencing, Mr. Foster. Let me go further to say the Court adopts the Presentence Report for all purposes of sentencing except as noted.

Criminal History Category is 1. All right, sir you may be heard.

MR. FOSTER: Well, Your Honor, in light of the guideline range being life, there's nothing really as far as wherever the Court will go within the guideline range.

My client did want me to request that he be -- that you recommend to the Bureau of Prisons designating him as close as possible to Texas to serve his time. And he also wanted to participate in the substance abuse treatment program in prison.

THE COURT: All right, sir. Thank you. Would you like to say anything else to the Court, Mr. Valladares?

THE DEFENDANT: I feel bad for having for the second time offended the state of North Carolina or the country, and forgive me. And I ask for forgiveness. And this won't happen again. And that you give me a good sentence for my children because they need my help. They don't even have a cent. And if you would give me a good sentence because of my children, and my parents are old and my brothers, they have two children, I will thank you very much.

THE COURT: All right. Anything further before the Court states the sentence?

MR. FOSTER: No, Your Honor.

MS. SHAPPERT: No.

THE COURT: Pursuant to the Sentencing Reform Act of 1984 it's the judgment of the Court that the defendant be placed in custody for a period of his life. It is further ordered that he support dependents from prison earnings while incarcerated.

Upon release, should he be released, he'll be on supervised release for a term of ten years. That's on Count One and a term of three years on Count Two running concurrently.

In accordance with established procedures provided by the Immigration and Naturalization Act, 8 U.S. Code 1101, and following sections, the defendant, upon release from imprisonment, should he be released, he is surrendered to a duly authorized immigration official for deportation

****

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

DOCKET NO. 3:00CR130-V

SUPERSEDING
BILL OF INDICTMENT

Violation:
21 U.S.C. § 841
21 U.S.C. § 846
18 U.S.C. § 1956

Filed: August 7, 2000

UNITED STATES OF AMERICA)
)
vs.)
)
(1) JOSE MATUSALEM CORONA)
(2) AUDREY DEAN MCGIRT)
(3) JUAN JOSE VALLADARES-HELGUERA)
(4) JUAN CARLOS VALLADARES-HELGUERA)
aka Jorge Garza)
(5) WALDO VALLADARES)
(6) FERNANDO GARZA-PENA)
(7) NORMA GARZA-PENA)
(8) PEDRO ORTIZ GUTIERREZ)
aka Angel Ortiz-Riquelme)
(9) JOSE SANCHEZ ABUNDES)
aka Enrique Sanchez)
aka Gustavo Elizama)
aka Kike)

(10) JUAN MERCADO)
(11) ELISEO ENRIQUEZ)
(12) JAMES ANDREW WALL)
(13) THURMAN BROOKS, JR.)
(14) JAMES WARD SHEFFIELD)
(15) CURTIS MCNEILL)
(16) EUTIMIO GARZA)
aka Tim Garza)
aka Tim Garcia)
(17) EVERADO CAPOTE LOPEZ)
aka Perico)
(18) RAUL BERNAL)
aka Carlos Valenzuela Hernandez)
(19) JAMES GRIFFIN)
(20) OLGA GARZA RIQUELME)
(21) REYNALDO PALACIOS)
aka Jesus Bergara)
(22) FNU LNU)
aka Tequilla)
aka Tequila)
(23) FNU LNU)
aka Chago)
(24) JOHNNY SONNY BRUCE)
(25) THOMAS WAYNE HETHCOX)

THE GRAND JURY CHARGES:

COUNT ONE

1. From in or about August 1996, and continuing until the present time, in Union within the Western District of North Carolina, and elsewhere

JOSE MATUSALEM CORONA
AUDREY DEAN MCGIRT
JUAN JOSE VALLADARES-HELGUERA JORGE GARZA

JUAN CARLOS VALLADARES-HELGUERA
WALDO VALLADARES
FERNANDO GARZA-PENA
NORMA GARZA-PENA
PEDRO ORTIZ GUTIERREZ, aka Angel Ortiz-Riquelme
JOSE SANCHEZ ABUNDES, aka Enrique Sanchez, aka Gustavo Elizama; aka Kike
JUAN MERCADO
ELISEO ENRIQUEZ
JAMES ANDREW WALL
THURMAN BROOKS, JR.
JAMES WARD SHEFFIELD
CURTIS MCNEILL
EUTIMIO GARZA, aka Tim Garza, aka Tim Garcia
EVERADO CAPOTE LOPEZ, aka Perico
RAUL BERNAL, aka Carlos Valenzuela Hernandez
JAMES GRIFFIN
OLGA GARZA RIQUELME
REYNALDO PALACIOS, aka Jesus Bergara
FNU LNU, aka Tequilla; aka Tequila
FNU LNU, aka Chago
JOHNNY SONNY BRUCE
THOMAS WAYNE HETHCOX

did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other, and others, both known and unknown to the Grand Jury, to possess with intent to distribute, a quantity of cocaine, a Schedule II controlled substance, a quantity of cocaine base, a Schedule II controlled substance and a quantity of marijuana, a Schedule I controlled substance, a violation of Title 21, United States Code, Section 841(a)(1).

2. Said conspiracy involved at least five (5) kilograms of a mixture and substance containing a detectable amount of cocaine.

3. Said conspiracy involved at least fifty (50) grams of a mixture and substance containing a detectable amount of cocaine base.
4. Said conspiracy involved at least one thousand (1000) kilograms of a mixture and substance containing a detectable amount of marijuana.
5. Defendant THUMAN BROOKS, JR. committed said violation after prior conviction for the following felony drug offenses had become final: Possession with Intent to Distribute Marijuana in the United States District Court for the Southern District of Texas, on or about March 9, 2000.
6. Defendant CURTIS MCNEILL committed said violation after prior conviction for the following felony drug offenses had become final: Possession with Intent to Sell or Distribute Cocaine and Sale or Delivery of Cocaine in the Superior Court of Robeson County, North Carolina, on or about June 2, 1992.
7. All in violation of Title 21, Unites States Code, Sections 846, 841(b)(1)(A)(ii)(II); 841(b)(1)(A)(vii).

COUNT TWO

From in or about August 1996, and continuing until the present time, in Union County, within the Western District of North Carolina, and elsewhere,

JOSE MATUSALEU CORONA
AUDREY MCGIRT
JUAN JOSE VALLADARES-HELGUERA

JUAN CARLOS VALLADERES-HELGUERA
WALDO VALLADERES
EVERADO CAPOTE LOPEZ

did combine, conspire, confederate and agree with each other, and others, known and unknown to the grand jury, to commit certain offenses against the United States as follows:

(a) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to conduct an attempt to conduct such a financial transaction with the intent to promote the carrying on of specified unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(A)(I); and

(b) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to conduct an attempt to conduct such a financial transaction knowing that the transaction was designed in whole or part to conceal and disguise the nature, the location , the source, the ownership and the control of the proceeds of specified unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(B)(I); and

(c) knowingly to engage in monetary transactions in criminally derived property that was of a greater than $10,000, in violation of 18 U.S.C. § 1957.

All in violation of Title 18, United States Code, Section 1956(h).

FORFEITURE NOTICE

Defendant(s) are given notice of the provisions of Title 18, Unites States Code, Section 982 and that all their interest in all property specified therein is subject to forfeiture.

As a result of the foregoing offense, and pursuant to Title 21, United States Code, Section 853(a), the defendants, shall forfeit to the United States any and all property constituting or derives form any proceeds the said defendants obtained directly or indirectly as a result of the said violation and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the violations alleged in this indictment, including but not limited to the following:

If any of the above-described forfeitable property, as a result of any act or omission of the defendants,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

A TRUE BILL:

/s/ Jeff --------
FOREMAN

MARK T. CALLOWAY
UNITES STATES ATTORNEY

/s/ ROBERT J. HIGDON, JR.
ASSISTANT UNITED STATES ATTORNEY